Nos. 89-1838 and 89-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ARABIAN AMERICAN OIL CO., *et al.*,
Respondents.

ALI BOURESLAN,
Petitioner,

v.

ARABIAN AMERICAN OIL CO., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief amicus curiae which supports the respondents' position and seeks the affirmance of the en banc majority opinion of the court below.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership comprises a broad segment of the employer community

in the United States, including over 220 major corporations and several trade associations which themselves have hundreds of corporate members. Its Board of Directors is composed of experts in labor and equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal aspects of EEO policies and requirements.

As employers, EEAC's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the other various federal orders and regulations pertaining to nondiscriminatory employment practices. Also, many of EEAC's members are multinational corporations with overseas facilities employing both United States citizens and nationals of other countries. As such, EEAC members have a direct interest in the issue presented for the Court's consideration in this case; that is, whether the provisions of Title VII of the Civil Rights Act of 1964 apply to American citizens working overseas for American companies. Indeed, EEAC filed briefs amicus curiae before the initial court of appeals panel and the en banc court in the instant case on the precise issue now before this Court.

As a significant part of its activities, EEAC has participated as amicus curiae in a number of cases involving the interpretation and enforcement of Title VII.[1] In addition, EEAC has filed several amicus curiae briefs in cases involving the extraterritorial application of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* These briefs were filed before Congress amended the ADEA in 1984 to extend its coverage ex-

[1] *E.g., Wards Cove Packing, Inc.* v. *Atonio*, 109 S.Ct. 2115 (1989); *Watson v. Forth Worth Bank and Trust Co.*, 108 S.Ct. 2777 (1988); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

pressly to United States citizens abroad.[2] Accordingly, because of the potentially enormous impact upon the employment practices and policies of corporations who employ individuals abroad and must comply with the conflicting laws of their host countries, this brief is submitted on behalf of EEAC's nationwide constituency.

ISSUE PRESENTED

Did Congress intend in 1964 to extend the employment discrimination provisions of the Civil Rights Act of 1964 overseas to regulate the practices of U.S. employers of U.S. citizens in workplaces outside the United States?

STATEMENT OF THE CASE

The facts are fully set forth in the Respondents' brief and adopted by reference herein. The facts most pertinent to EEAC's brief are set forth below.

The plaintiff, a Moslem United States citizen, was born in Lebanon and worked for the ARAMCO Service Company (ASC) in Texas until 1980, when he requested a transfer to Saudi Arabia to work for the Arabian American Oil Company (ARAMCO). The plaintiff subsequently instituted this action alleging that his British supervisor in Saudi Arabia began harassing him about his national origin, race and religion in September 1982. He subsequently was laid off in June 1984, and initiated these proceedings.

The district court granted ARAMCO's motion to dismiss for lack of subject matter jurisdiction, and held that Title VII could not be applied extraterritorially. *Boureslan v. ARAMCO*, Pet. App. 77a-82a.[3] Specifically, the

[2] *See Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1985); and *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984).

[3] Pet. App. references are to the appendix to the United States' petition for a writ of certiorari.

court found that "Congress enacted Title VII to remedy domestic discrimination" and "[t]here is no indication that Congress was concerned about discrimination abroad." *Id.* at 79a. The court concluded that the imposition of Title VII abroad would invade the sovereignty of other nations, noting in this case that Saudi Arabian employment law conflicted with Title VII.

A Fifth Circuit panel affirmed the district court's decision by a 2-1 vote, and the full court later reaffirmed that decision. The court noted in its en banc decision that it could find no indication in the law or in Title VII's legislative history that Congress intended to extend civil rights protection to American citizens employed abroad. The court rejected Boureslan's and the Equal Employment Opportunity Commission's (EEOC) arguments that Title VII's protections should be extended to Americans working abroad. Instead, the Fifth Circuit found strong countervailing policy arguments against the extraterritorial application of Title VII. The court below further noted that religious and social customs practiced in many countries are at odds with those of this country. Yet Title VII says nothing about potential conflicts with foreign discrimination laws. Indeed, the panel majority noted that "[r]equiring American employers to comply with Title VII in such a country could well leave American corporations the difficult choice of either refusing to employ United States citizens in the country or discontinuing business." Pet. App. at 41a.

The en banc decision further pointed out that Title VII is silent in a number of areas where Congress ordinarily provides guidance if it wishes to apply a statute extraterritorially. For example, the Act has no provisions for venue problems that arise with foreign violations. Also, the statute seems to limit EEOC's investigatory powers to the United States and its territories. Pet. App. at 5a.

In lengthy dissents, Judge King argued that Congress intended that Title VII apply to the overseas operations of American corporations. The dissent reasoned that the Act's exemption for aliens employed outside the United States implies that United States citizens working outside the United States are covered by Title VII. In addition, Judge King argued that Title VII could be enforced with existing venue, investigatory and other provisions.

Judge King's panel dissent, which was adopted in the en banc dissent (Pet. App. at 8a n. 1), set forth additional reasons for applying Title VII overseas. This analysis rested in large part upon Section 403, Restatement (Third) of the Foreign Relations Law of the United States, which Judge King interpreted to mean that "a statute will not be applied extraterritorially where it would be unreasonable to do so, unless Congress has affirmatively required that it be so applied." Pet. App. at 51a. In Judge King's view, extraterritorial application of Title VII would not be unreasonable, and therefore the statute should be applied abroad without any "affirmative" statement of congressional intent. Pet. App. at 74a.

SUMMARY OF ARGUMENT

When Congress enacts an employment statute, the courts presume that Congress is concerned with domestic employment conditions and not those outside the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Accordingly, the courts have adopted a canon of construction that a statute enacted by Congress is *presumed* to apply within the territorial United States. *Id.*; *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989). This presumption can be overcome only by a clear expression by Congress that it intends that the statute be applied extraterritorially. *Foley Bros.*, 336 U.S. at 286.

Neither the Supreme Court nor any federal appeals court has ever applied an employment statute extraterri-

torially unless Congress has affirmatively expressed its intent by statutory language stating that the statute is applicable "outside the continental United States," "in a foreign country" or by equivalent language. Here, there is no direct statutory language or legislative history clearly expressing that Title VII applies overseas.

The presumption against extraterritoriality cannot be overcome by reliance upon Section 403 of Restatement (Third), Foreign Relations Law of the United States ("Restatement"). Indeed, the Restatement reinforces, rather than rebuts, the presumption. Section 401 establishes the principle that a state has a legitimate right to exercise its jurisdiction in certain ways, but may not regulate individuals or conduct overseas without limitation. Section 402, in turn, provides the foundation for an affirmative exercise of such jurisdiction by the state, and provides in pertinent part that: "[s]ubject to § 403, a state has jurisdiction to prescribe with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory . . . ." Section 403 then follows and provides the limitations on states' jurisdiction to prescribe laws and sets forth the "reasonableness" limitation of international law when a state affirmatively attempts to apply a domestic law outside its own territory.

To the extent the dissent's and the EEOC's analyses focus on the principles set forth in Section 403(1), they bypass the initial inquiry set forth in Section 402—that is, whether Congress did, in fact, prescribe in Title VII to regulate the activities or conduct of individuals outside of its territory. For if there is no such law, logically, there can be no such determination of its reasonableness. In this case, Congress has never indicated that Title VII would apply to United States citizens working abroad. Moreover, Section 702 of Title VII cannot be used to draw the negative inference that Title VII must cover United States citizens extraterritorially because it exempts only "aliens outside any state."

Amici NAACP, Legal Defense and Educational Fund, Inc., *et al.* offer policy arguments based on an unsupported assumption that American employers affirmatively will engage in discrimination abroad. From a practical standpoint, however, employers often must specially train workers for overseas assignments and provide them with special compensation, terms and other conditions of employment. The costs of such efforts are higher than those associated with domestic employment. Thus, the economic costs of discrimination abroad are prohibitive, and serve as effective deterrents to discourage rather than encourage employers to engage in such practices. Nor is extraterritorial application of Title VII necessary to prevent domestic corporations from making decisions to exclude minorities, women and other protected individuals from overseas assignments. In such cases, there generally will be sufficient nexus to the United States to allow the assertion of Title VII jurisdiction, thus allowing an examination of whether the practice violates the Title VII rights of U.S. citizens.

Other arguments of the petitioners and their supporting *amici* are fraught with pitfalls. As a practical matter, a comprehensive employment discrimination law such as Title VII cannot be applied overseas without any appropriate procedural mechanisms. Yet, when Congress enacted Title VII in 1964, it limited venue and the EEOC's investigatory powers to testimony or evidence obtained within the states of the United States. When it amended the law in 1972, it failed to broaden these powers to matters overseas. And although venue might be possible where a corporation has its U.S. headquarters, documents and witnesses may be thousands of miles away with no possibility of a change of venue for the convenience of the parties or in the interests of justice. 28 U.S.C. § 1404. In addition, Title VII makes no provision for exempting coverage where it would conflict with the laws of another sovereign power.

In addition, when an American employer's overseas work force has citizens of various countries, application of standard Title VII remedies could directly harm non-Americans. For example, the EEOC's remedial guidelines call for reinstatement, "bumping" of incumbents, discipline or discharge of offending supervisors, and preferential treatment remedies for identified victims of discrimination. Employers could protect against attacks upon case settlements by joining non-U.S. citizens to a suit in federal court in order to protect their interests. See *Martin v. Wilks*, 109 S.Ct. 2180 (1989). But this not only would draw noncitizens directly into the American legal system; it would require them to travel to the United States in order to protect their job status. If Congress intended such a result, it hardly comes clear from a reading of Title VII.

In contrast to Title VII's silence, when Congress amended the ADEA in 1984 to extend jurisdiction of its provisions extraterritorially, it expressly exempted employer practices involving U.S. citizens that would cause the company to violate the laws of the host country. 29 U.S.C. § 623 (f)(1). Thus, when Congress has intended that a United States employment statute be applied to American companies overseas, it has exercised great care to ensure that such application will not conflict with foreign statutes.

Were this Court to accept the economic and international policy arguments set forth by the petitioners and their amici, it effectively would be making foreign policy and legislative decisions in a matter where Congress has chosen not to act. "It is [outside] the province of this Court to delve into matters international on such a tenuous basis." *Hodgson v. Union de Permisionarios Circulo Rojo*, 331 F. Supp. 1119, 1122 (S.D. Tex. 1971).

ARGUMENT

I. TITLE VII CANNOT PROPERLY BE INTERPRETED TO COVER EMPLOYERS OF AMERICAN CITIZENS WORKING OUTSIDE THE UNITED STATES, BECAUSE THE LANGUAGE OF TITLE VII AND ITS LEGISLATIVE HISTORY EVIDENCE NO AFFIRMATIVE CONGRESSIONAL INTENT TO APPLY TITLE VII EXTRATERRITORIALLY.

A. Employment Statutes Are Presumed To Apply Within the Boundaries of the United States Unless Congress Clearly Expresses Its Intent That Such a Statute Is To Have Extraterritorial Application.

The question before the Court is whether Title VII of the Civil Rights Act of 1964, which generally prohibits employment discrimination on the basis of race, color, religion, sex or national origin, covers United States citizens employed by U.S. companies in foreign countries. It is a well-established canon of construction that a statute enacted by Congress is presumed to apply only within the territorial jurisdiction of the United States *unless a contrary intent is expressed. Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977). In the "delicate field of international relations *there must be present the affirmative intention of the Congress clearly expressed.* It alone has the facilities necessary to make fairly such an important policy decision. . . ." *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (emphasis added).

The courts, including the appellate and district courts below, have uniformly construed United States employment laws as being limited to the territorial boundaries of the United States absent an affirmative expression of congressional intent that the statute have an extraterritorial effect. *See, e.g., McCulloch v. Sociedad Nacional de*

Marineros de Honduras, 372 U.S. 10, 19 (1963) (National Labor Relations Act held not to apply to maritime operations of foreign flagships absent "specific language in the act itself or in its extensive legislative history that reflects such a congressional intent").[4] In sum, absent a clear expression of congressional intent to apply an employment statute outside the United States, the courts assume "that Congress is primarily concerned with domestic conditions." *Foley*, 336 U.S. at 285.

This Court in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989), recently applied these principles and restated the necessity of affirmative congressional intent to extend a statute extraterritorially. *Argentine Republic* involved the issue of whether the federal courts have jurisdiction over noncommercial tort claims against a foreign country under the Foreign Sovereign Immunities Act (FSIA) 28 U.S.C. § 1330 *et seq.* Specifically, the Court focused on whether the FSIA conferred jurisdiction over tortious acts committed on the high seas outside of United States territorial waters.[5] The Court observed that "when it desires to do

[4] *See also*, *Benz*, 353 U.S. at 142 (Labor Management Relations Act of 1947 held not to extend to disputes resulting from picketing of foreign ships in United States ports because parties could "point to nothing in the Act itself or its legislative history" indicating congressional intent to cover such disputes, as "there must be present the affirmative intention of Congress clearly expressed." *Id.* at 147); *Foley Bros.*, 336 U.S. at 286 (Eight Hour Law held not to apply to contracts between the United States and private contractors for construction work in a foreign country "in the absence of a clearly expressed purpose" by Congress); *Air Line Dispatchers Ass'n. v. National Mediation Board*, 189 F.2d 685 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 849 (1951) (amendment to Railway Labor Act which extended coverage to air carriers "engaged in interstate or foreign commerce" held not to apply outside the United States in the absence of explicitly congressional intent).

[5] Respondents brought these claims against the Argentine government for damages its ship sustained when it was attacked in international waters by Argentine military aircraft during the Falkland Islands war. 109 S.Ct. at 686-87.

so, Congress knows how to place the high seas within the jurisdictional reach of a statute." 109 S.Ct. 691.[6] Since Congress made no affirmative statements to apply the FSIA extraterritorially, the Court applied *Foley* and held that the FSIA does not extend to tortious conduct outside the United States territorial waters. *Id.*

The *Argentine Republic* principles are no less applicable in this case. In enacting Title VII, Congress was concerned solely with the domestic aspects of employment discrimination. Indeed, after examining the statutory language and legislative history of Title VII, the court below correctly concluded that, "[the] references to Title VII's legislative history fall far short of the clear expression of congressional intent required to overcome the presumption against extraterritorial application." (Pet. App. at 38a); and *see* (Pet. App. at 81a) ("[i]t is much more likely that Congress never considered the issue."). And as the majority below observed:

> The statements, carefully taken from a voluminous legislative history, are no more specific than the statutory language itself. To rely on such general policy statements would effectively adopt a presumption in favor of extraterritorial application. This is particularly true when the legislative history contains numerous statements that arguably favor geographic limits for Title VII.

Pet. App. at 38a. And *see* Pet. App. at 81a. ("It is doubtful that Congress reserved the question of Title VII's application for the courts to decide.").[7]

[6] The Court cited three statutes as examples where Congress specifically referred to the high seas in order to extend extraterritorial jurisdiction. *See, e.g.*, 14 U.S.C. § 89(a) (Coast Guard searches and seizures upon the high seas); 18 U.S.C. § 7 (Criminal code extends to high seas); 19 U.S.C. § 1701 (Customs enforcement on the high seas). 109 S.Ct. at 691 n.7.

[7] *Amicus* EEAC further urges the Court to adopt the panel holding that the alien exemption found in Section 702 of Title VII does not imply that U.S. citizens working overseas are covered by Title VII. This issue has been fully briefed in the respondents' briefs to

B. When Congress Has Intended That an Employment Statute Should Apply Outside the United States, It Has Shown That Intent Clearly and Unambiguously.

Congress has demonstrated on many occasions that it is well aware that it must specifically and directly provide for the extraterritorial application of an employment statute when it intends the statute have such effect. For example, several courts had ruled that the Age Discrimination in Employment Act (ADEA) did not apply extraterritorially.[8] In response, Congress in 1984 amended Section 11(f) of the ADEA by adding a new sentence to the definition of "employee" to provide that: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace *in a foreign country.*" 29 U.S.C. § 630(f) (emphasis

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this Court. EEAC agrees with those arguments. As further briefing would be repetitious, we adopt those arguments by reference.

We point out, however, that one commentator on the exemption provision, noting the absence of legislative history regarding its purpose, has stated that "the exemption language . . . was simply adopted from early civil rights legislation that was introduced at a time [1949] when aliens were excluded from certain domestic protective labor legislation and restricted in their employment opportunities within the United States. . . . [A]t the time, the original drafters did not want to call attention to the fact that such legislation would apply to citizens as well as aliens in the United States." Kirschner, 34 Lab. Law J. at 399-400 (July 1983) (footnote omitted). Under these circumstances, the alien exemption provision alone, which does not directly address the application of Title VII to U.S. citizens, can hardly be said to be a clear expression of congressional intent to apply Title VII to U.S. citizens extraterritorially.

[8] Six circuits held that the ADEA prior to 1984 did not cover American citizens employed in foreign countries. *E.g., S.F. DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984); *Thomas v. Brown and Root, Inc.*, 745 F.2d 279 (4th Cir. 1984); and *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984).

added). Furthermore, it added a new Section 4(g)(1) that states: "If an employer controls a corporation whose place of incorporation is *in a foreign country*, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer." 29 U.S.C. § 623(g)(1) (1984) (emphasis added). These statutory provisions are also supported by unequivocal legislative history that these amendments "make[] provisions of the Act apply to citizens of the United States employed in foreign countries by United States corporations or their subsidiaries." S. Rep. No. 98-467, 98th Cong., 2d Sess. 2 (1984). In contrast, neither Title VII nor its legislative history contains any such direct expression that it applies extraterritorially.

Congress obviously considered the 1984 amendment to the ADEA necessary to provide an affirmative expression of its intent. In *S.F. DeYoreco v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986), the Court concluded that the amendment must have added something that was not already there. "If Congress found it necessary to extend the coverage of the ADEA to foreign-employed United States citizens, the statute's reach must not originally have gone that far." *Id.* at 1283. Thus, the 1984 amendment effectively changed the law rather than just clarified it.[9]

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[9] Senator Grassley's statement when introducing the ADEA amendment in 1983 does not establish that Congress intended to make Title VII applicable overseas. See 129 Cong. Rec. 34,499 (1983). The Senator stated that the substantive provisions of the ADEA and Title VII are "worded nearly exactly" the same and that "at least two district courts have held [that Title VII] does apply abroad. Thus, the legislation I am introducing today clears up an anomaly I believe Congress never intended." *Id.*

The real anomaly, however, is that, having made this statement, Senator Grassley proceeded to not use Title VII's language on employee coverage to amend the ADEA. Instead, he used more specific language to make sure that the ADEA would apply outside the United States. Indeed, since he felt Title VII and the ADEA's substantive language were nearly identical, the fact that he used

Accordingly, when Title VII is compared with employment and other statutes in which Congress has directly and unambiguously made clear its intention that the statute have extraterritorial effect, it is evident that in enacting Title VII, Congress manifested no such intent.

II. EXTRATERRITORIAL APPLICATION OF TITLE VII WOULD CONFLICT WITH PROPER CONSTRUCTION OF INTERNATIONAL LAW PRINCIPLES.

A. The Dissent and the Amici Incorrectly Rely On Restatement (Third) Section 403 Without First Having Established a Basis of Jurisdiction Under Restatement (Third) Section 402.

As shown, the well-established principles found in *Foley*, *Argentine Republic* and other decisions create the presumption against extraterritorial application of a federal statute. Indeed, as Judge King's initial dissent in this case recognized, ordinarily there is "a presumption that Congress intends legislation to apply only within the territorial jurisdiction of the United States, unless a contrary intent appears." Pet. App. 43a-44a.

The dissent (Pet. App. 50a-60a), and amici curiae Lawyers' Committee for Civil Rights Under Law and International Human Rights Law Group argue, however, that because, in their view, it would be "reasonable" under principles of international law to apply Title VII outside

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different jurisdictional language would indicate he felt he had to go beyond Title VII to assure overseas coverage of the ADEA. Moreover, the two district court cases hardly are persuasive as to Title VII's coverage. One merely addresses the issue in dicta (*Love v. Pullman Co.*, 13 Fair Empl. Prac. Cases (BNA) 423 (D. Colo. 1876), *aff'd*, 569 F.2d 1074 (10th Cir. 1978)), and the other was reversed on appeal. See *Bryant v. International Schools Servs., Inc.*, 502 F. Supp. 472 (D.N.J. 1980), *rev'd on other grounds*, 675 F.2d 562 (3d Cir. 1984). Thus, the meager legal weight of these authorities is hardly sufficient to overcome the presumption against statutory extraterritory.

the United States, the presumption is thereby overcome. Their primary authority is Section 403 of Restatement (Third), Foreign Relations Law of the United States ("Restatement"). As discussed below, however, the Restatement reinforces, rather than rebuts, the presumption against extraterritoriality.

Under international law, a state may not regulate individuals or conduct overseas without limitation. Section 401 of the Restatement provides in part:

> Under international law, a state is subject to limitations on[:]
>
> (a) jurisdiction to prescribe, *i.e.*, to make its law applicable to the activities, relations, or status of persons, or the interests of person in things, whether by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court;. . . .

Section 402, in turn, provides the foundation for an affirmative exercise of such jurisdiction by the state. It is clear from the Introductory Note to Section 402, however, that the jurisdictional chapter of the Restatement was intended to provide limitations on the overseas exercise of the state's authority. Thus:

> Attempts by some states—notably the United States—to apply their law on the basis of very broad conceptions of territoriality or nationality bred resentment and brought forth conflicting assertions of the rules of international law.

Restatement at 236. When the United States attempted to exercise its authority overseas in a whole range of areas (e.g., economic sanctions, maritime, aeronautics, antitrust, securities), it generated resentment, blocking legislation, and conflicting assertions of jurisdiction. *Id.* at 236.

Accordingly, the United States courts, and courts in other countries, have interpreted the "known or presumed

intent of Congress, in light of changing understandings." *Id.* at 236-37. Because of these concerns about overly aggressive application of United States laws in foreign lands, the Restatement indeed may erect a stronger presumption against extraterritoriality than the presumption made by our federal courts. In no way can the Restatement be interpreted to provide affirmative support for application of Title VII overseas even without an "*affirmative* statement of congressional intent," as argued in Judge King's dissent (Pet. App. at 75a, emphasis in the original).

Furthermore, while Section 401 of the Restatement establishes the principle that a state has a legitimate right to exercise its jurisdiction in certain ways, Section 402 provides that the requisite foundation for the exercise of such authority must be found. Section 402 states in pertinent part, "[s]ubject to § 403, a state has jurisdiction to prescribe with respect to . . . (2) the activities, interests, status, or relations of its nationals outside as well as within its territory. . . ." Section 403 then follows and provides the limitations on a state's jurisdiction to prescribe laws. Specifically, Section 403(1) sets forth the "reasonableness" limitation of international law: [10]

> *Even when one of the bases for jurisdiction under § 402 is present*, a state may *not* exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when

[10] Many courts have applied and interpreted the "reasonableness" test. *See, e.g., Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (Relying on Section 403(1), the court concluded that jurisdiction may not "exceed the bounds of reasonableness imposed by international law."); *United States v. Wright-Barker*, 784 F.2d 161, 168 (3d Cir. 1986); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985). Indeed, the 1987-88 pocket part to the Restatement at 157 cites *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985) (ADEA does not apply overseas), as a case where assertion of jurisdiction apparently would not be reasonable under Section 403.

> the exercise of such jurisdiction is unreasonable. (Emphasis added).

The accompanying comment states that:

> The principle that an exercise of jurisdiction on one of the bases indicated in § 402 is nonetheless unlawful if it is unreasonable is established in United States law, and has emerged as a principle of international law as well. There is wide international consensus that the links of territoriality or nationality, § 402, while generally necessary, are not in all instances sufficient conditions for the exercise of such jurisdiction.

To the extent various briefs focus on the principles set forth in Section 403(1), they fail to address the initial issue posed in Section 402: whether Congress has in fact prescribed a law to regulate the activities or conduct of individuals outside of its territory under Title VII. For if there is no such law and Congress did not apply a law outside the United States, then Section 403 would not come into play, regardless of whether overseas application of the law would be reasonable.

Thus, the requirement of "reasonableness" in Restatement Section 403(1) is an additional limitation a statute must overcome in order to have extraterritorial effect, but only where Congress clearly intended that the law have such an effect. Section 403 is not an independent test for determining whether Congress, in fact, had such intent.

In the instant case, Congress has not seen fit to extend its jurisdiction to "prescribe law with respect to . . . [employment discrimination] . . . the activities, interests, status, or relations of its nationals outside as well as within its territory . . . ." Restatement Section 402. Because Congress has never expressed intent to do so, this Court is without authority to construct such intent judicially in order to satisfy policy considerations.

B. Extraterritorial Application of Title VII Would Be Impractical and Unreasonable.

The unreasonableness of applying Title VII overseas provides an additional reason why the courts should refrain from doing so absent a clearer expression of Congressional intent than presently can be found in Title VII. Thus, even if arguendo, the requisite expression of clear congressional intent to apply Title VII extraterritorially could be claimed to have been made in this case, so as to make the "reasonableness" of such jurisdiction a relevant inquiry, this factor ultimately would not avail the appellants and their *amici*, because the extraterritorial application of Title VII would be unreasonable from a practical standpoint.

Congress and the courts have been justifiably reluctant to extend the scope of employment statutes involving the personnel policies and practices of multinational companies outside the United States for two primary reasons. First, extraterritorial application of United States employment laws would invade the sovereignty of the host country to establish employment standards for workers within its territories and its own citizens. Second, it would subject companies attempting to comply with United States laws to potentially conflicting standards. These policy considerations further support the conclusion that Title VII should not be applied outside the territorial boundaries of the United States.

According to the International Labor Organization, a specialized agency of the United Nations, nearly 140 countries have enacted some form of employment discrimination statute covering both citizens and aliens.[11] These laws are not uniform and provide a wide variety

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[11] International Labor Organization, *Equality in Employment and Occupation*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations (1988).

of legal requirements.[12] In the instant case, Saudi Arabian law applies to religious preferences, favoritism towards nationals and protection of women, and its substantive and procedural provisions differ from those of Title VII.[13]

Enforcement of Title VII in Saudi Arabia based on the appellant's allegations of racial, national origin and religious discrimination would clearly invade the sovereignty of Saudi Arabia, whose own discrimination statute applies to employees of foreign corporations operating within its borders. *Id.* This conflict is particularly significant here because, although ARAMCO is incorporated in the United States, its assets are owned by the Kingdom of Saudi Arabia and are almost totally located there, the great majority of its employees are nationals of Saudi Arabia or other non-United States countries, and its products are almost exclusively sold only in Saudi Arabia. The employment conditions sought to be regulated by Title VII, therefore, are the "primary concern of a foreign country." *Foley*, 336 U.S. at 286.[14]

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[12] *Id.*

[13] *See, e.g.*, Labor and Workmen Law, Articles 48-50 (Employment of Foreigners), Article 80 (Labor Contract), Article 91 (Obligations of Employer), Articles 160-62, 164-70 (Employment of Women).

[14] The dissent below inadvertently provides an additional argument against applying Title VII overseas. The dissent argues that "[w]e do not know, for example, to what extent a foreign state would enforce its own laws to regulate the employment relationship between a U.S. corporation and employees who are U.S. citizens, or whether it would make its administrative and judicial procedures available to a United States employee seeking to bring a grievance against a U.S. employer." Pet. App. at 61a. See also the amicus brief of the International Human Rights Law Group at 56. Thus, clearly, the dissent would apply Title VII in foreign nations when it had no idea of the potential conflict it would create between Title VII and the law of other host countries.

III. CONGRESS' FAILURE TO ESTABLISH OVERSEAS PROCEDURES FOR ENFORCEMENT, DEFERRAL OF CASES, INDIVIDUAL RELIEF AND CONFLICTS OF LAWS IS FURTHER COMPELLING EVIDENCE THAT IT DID NOT ENVISION EXTRATERRITORIAL APPLICATION OF TITLE VII.

The arguments that Title VII should be applied overseas are being made in a legal vacuum, for they appear to contemplate situations where a federal law may be applied without any appropriate procedural or remedial mechanisms. Realistically, it is difficult to conclude that Congress intended that a federal law have extraterritorial application when it did not concurrently provide any appropriate substantive and procedural mechanisms for such unique applications. Yet in enacting Title VII, Congress failed to provide any mechanisms for overseas enforcement. The legislature's failure to make any provision dealing with the practical consequences of extending Title VII overseas is a further compelling reason the Courts should refrain from applying Title VII overseas without a clearer mandate from Congress.

A. Overseas Application of Title VII's Remedial Provisions Would Impact Directly on the Nationals of the Host Country.

Neither the EEOC nor any of its supporting amici recognize the impact that overseas enforcement of Title VII would have on the non-U.S. citizens working side-by-side with American citizens, as occurs to a large degree in Aramco's workforce. For example, in 1985, EEOC adopted a policy that "full relief" should be sought in each case that the EEOC's District Director concludes has merit. *See* EEOC Policy Statement on Remedies and Relief for Individual Victims of Discrimination, 8 Fair Empl. Prac. Man. (BNA) at 405:3001.

Such relief could include immediate and unconditional reinstatement to the position the individual would have occupied absent discrimination. The discriminatee must be offered some job in the employer's operation for which he or she is qualified. Non-U.S. citizens could lose jobs as a result.

The EEOC's policy also states that "[i]n certain circumstances, the Nondiscriminatory Placement of a victim of discrimination may require the job displacement of another of the respondent's employees"—a potentially direct impact on individuals who are not U.S. citizens. *Id.* at 405:3003. The individual discriminatee also may be given retroactive seniority, thus affecting the relative seniority rights of non-American employees. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

Further, should an employer wish to settle a Title VII case and protect a settlement or consent decree from later collateral attack by non-Americans, it would have to join those non-Americans as parties to the lawsuit so that the non-Americans could protect their individual rights from encroachment by a Title VII remedy benefitting others. See, *Martin v. Wilks*, 109 S.Ct. 2180 (1989). This procedure would be incredibly clumsy, particularly in light of the government's argument that these cases should be tried in the United States in jurisdictions where employers have their principal places of business.

The employer also may be required to educate a non-U.S. citizen supervisor in how to comply with Title VII. The employer also may be required by the EEOC "to discipline or remove the offending individual from personnel authority." To afford U.S. citizens greater protections than other employees could have a serious adverse effect on the morale of foreign nationals in the plant workforce. Thus, as a practical matter, extraterritorial application of Title VII would put U.S. companies under strong pressure to treat all employees as though they were covered by Title VII, even if, as in the case of Saudi Arabia, that might mean violating the laws or religious practices of the host country.

Thus, like the Court's refusal to apply the U.S. Eight Hour Law to Iran and Iraq in *Foley Bros. v. Filardo*, "it would be anomalous . . . for an act of Congress to regulate" the relative work status of both U.S. and non-U.S. citizens working for a U.S. employer overseas. 336 U.S. at 289.[15] As in *Foley*, the federal statute in question here should not be applied outside U.S. territory.

B. Overseas Application of Title VII's Procedural Mechanism Would Be Impractical and Should Not Be Imposed in Other Countries Given the Lack of a Congressional Mandate To Do So.

The overseas application of Title VII procedural mechanisms would cause severe practical problems. Without a clearer indication that Congress intended that these problems be tolerated, Title VII should be applied only in the territory of the United States. Several examples are illustrative. For one, Title VII's provisions relating to the EEOC's investigatory powers and venue demonstrate that Congress never intended Title VII to apply overseas.

[15] The petitioners and their various supporting amici make too much of the extraterritorial application of the Lanham Act permitted by *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). There, a U.S. citizen committed a trademark infringement in violation of federal law. Bulova Watch Company, the offended company, was a U.S. citizen, and there was no concern expressed in that case that application of the Lanham Act would improperly infringe on any foreign laws that dealt with trademark infringements. Neither were the legitimate rights of non-U.S. citizens affected by application of U.S. law overseas.

Instead, the Court stressed the nexus between the foreign acts and the U.S. market for Bulova's watches and concluded that:

> [Steele's] operations and their effects were not confined within the territorial limits of a foreign nation. He brought component parts of his wares in the United States, and spurious "Bulovas" filtered through the Mexican border into this country; his competing goods could well reflect adversely on Bulova Watch Company's trade reputation in markets cultivated by advertising here as well as abroad.

344 U.S. at 286.

As enacted in 1964, the EEOC's investigatory powers were limited to testimony or evidence obtained within the states of the United States. 42 U.S.C. § 2000e-9. The amendment of this investigatory authority in 1972 did not broaden these powers to matters overseas. Thus, "[i]f plaintiff were correct in arguing that [the statute] applies extraterritorially, it would be anomalous for Congress not to have authorized power of investigation that were co-extensive with the reach of the Act." *Cleary v. United States Lines, Inc.*, 555 F. Supp. 1251, 1260 (D.N.J. 1983), *aff'd*, 728 F.2d 607 (2d Cir. 1984).[16]

Again, when Congress intends a statute to have effect overseas, it knows how to provide appropriate enforcement mechanisms. For example, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 109 S.Ct. 683 (1989), the Supreme Court analyzed the legislative history of the Foreign Sovereign Immunities Act (FSIA), and concluded that "Congress' intention to enact a comprehensive statutory scheme is also supported by the inclusion in the FSIA of provisions for venue . . . removal . . . and attachment and execution. . . ." *Id.* at 688 n.3.

In contrast, in enacting Title VII, Congress was greatly concerned that it not unduly interfere with the sovereignty or override the laws of even the various *states* of the United States. Sections 708 and 1104, 42 U.S.C.

[16] Had Congress intended that Title VII was to have an extraterritorial reach, it would have provided for venue over the operations of American companies employing United States citizens overseas, instead of limiting venue to the employment decisions of companies within the United States. 42 U.S.C. § 2000e-5(f)(3). Further, even if "principal office" venue might be a technical possibility, there would be no chance for the parties to move for a change of venue "[f]or the convenience of the parties and witnesses, [or] in the interest of justice." 28 U.S.C. § 1404. Thus, Title VII cases would have to be tried in courts which, if a more favorable U.S. forum were available, would not hear such cases in most instances because the documents, witnesses and place of violation were thousands of miles away.

§§ 2000e-7, 2000h-4. Accordingly, Congress made specific provision in Section 706 of Title VII for deferral to state employment discrimination proceedings. 42 U.S.C. § 2000d-5(c), (d), and (e). Invasion of another country's sovereignty with respect to that nation's own discrimination laws would clearly be a matter of great international significance. Yet Title VII does not contain any similar provisions for deferral to the laws of another country. It would be wholly anomalous to conclude that Title VII recognizes and respects the laws of the various American states, but ignores and overrides the laws of foreign nations.

The amicus International Human Rights Law Group argues that the likelihood of conflict with Saudi Arabian policies would be minimal because Saudi Arabia has ratified International Labor Organization Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation. (Br. 57-60) This argument ignores the fact that the United States Senate has not ratified this convention, thus making implausible the conclusion that there is no potential for conflict. Further, Convention 111 is not self-enforcing. Article 2 of the Convention allows each individual ratifying country to "undertake to declare and pursue a national policy designed to promote *by methods appropriate to national conditions and practice*," the elimination of discrimination. (Emphasis added).

Even in the United States, the EEOC will not defer a charge to a state or locality unless EEOC determines that the other agency has a nondiscrimination law comparable to Title VII. See Section 706(c) of Title VII (42 U.S.C. Sec. 2000e-5(c)). EEOC does not suggest to this Court any method by which EEOC or the courts could determine whether any particular application of Title VII would conflict with the law of another country. It is ludicrous, however, to suggest that application of Title VII in Saudi Arabia would not conflict with Saudi Arabian practices.

See *Country Reports on Human Rights Practices for 1989*, Report by the U.S. Department of State to the Committee on Foreign Affairs, House of Representatives, and the Committee on Foreign Relations, U.S. Senate, February 1990, at 1557-60.

Further, the ADEA again provides another contrast with Title VII. For, unlike the ADEA, which was specifically expressed to apply abroad, Title VII makes no provision for exempting coverage where it would conflict with the laws of another sovereign power. In the amendment to the ADEA, Congress was particularly concerned that the overseas application of that employment law not conflict with the existing laws of other countries. Thus, unlike Title VII, when Congress clearly extended jurisdiction of the ADEA's provisions extraterritorially, it expressly provided in Section 4(f)(1), 29 U.S.C. § 623(f)(1), that it is not unlawful for an employer to take any action prohibited by the ADEA "where such practices involve [a United States citizen] in a foreign country, and compliance . . . would cause such employer . . . to violate the laws of the country in which such workplace is located." Thus, when Congress has intended that a United States employment statute should be applied to American companies and citizens overseas, it has exercised great care to ensure that such application would not conflict with foreign statutes.

IV. *AMICI* NAACP, LEGAL DEFENSE FUND, *ET AL.*, MISCONSTRUE CONGRESSIONAL INTENT AND IMPROPERLY URGE THIS COURT TO MAKE FOREIGN POLICY DECISIONS CONCERNING EMPLOYMENT PRACTICES OVERSEAS.

The arguments made by *amici* NAACP Legal Defense and Education Fund, *et al.*, offer no further support for the petitioners. Indeed, those arguments highlight the weakness of Petitioner's reliance on Title VII's own history. The Amici are forced to juxtapose the adoption of Senate Resolution 323, 84th Cong., 2d Sess. in 1956, with

the enactment of Title VII in 1964.[17] *Amici* NAACP Legal Defense Fund *et al.*, draw the inference that since Congress adopted the resolution in 1956, it also intended in 1964 to extend Title VII's coverage abroad. They claim this resolution "further illustrates Congress' desire to assure that American citizens abroad enjoy to the maximum extent possible, the same employment opportunity they enjoyed within the United States." Brief of *Amici Curiae* NAACP Legal Defense Fund, *et al.* at 15. But in so doing, *amici* proverbially "put the cart before the horse."

First, Senate Resolution 323 simply is not relevant to Title VII. The resolution has no force or effect of law, since it was a resolution, rather than a bill, and it was not passed by both Houses. Second, the resolution was passed nearly ten years *before* the passage of Title VII. Third, it has little, if anything, to do with employment discrimination and deals only with religious affiliation. Finally, nowhere in the legislative history of Title VII

[17] Senate Resolution 323 states:

> Whereas the protection of the integrity of United States citizenship and of the proper rights of United States citizens in their pursuit of lawful trade, travel, and other activities abroad is a principle of United States sovereignty; and
>
> Whereas it is a primary principle of our Nation that there shall be no distinction among United States citizens based on their individual religious affiliations and since any attempt by foreign nations to create such distinctions among our citizens in the granting of personal or commercial access or other rights otherwise available to the United States citizens generally is inconsistent with our principles; Now therefore, be it
>
> *Resolved*, That it is the sense of the Senate that it regards any such distinctions directed against the United States citizens as incompatible with the relations that should exist among friendly nations, and that in all negotiations between the United States and any foreign state every reasonable effort should be made to maintain this principle.

S. Res. 323, 84th Cong., 2d Sess. (1956) (*quoted in* 102 Cong. Rec. 14330 (July 25, 1956)).

or in the congressional debates is there any reference to this resolution.

In essence, the NAACP, *et al.*, characterize S. Res. 323 as a comprehensive piece of legislation which prohibited employment discrimination. But if the resolution was intended to have that effect, Congress would have had no need to enact Title VII. It is therefore illogical to assume that Congress in 1956, *a priori*, intended to apply Title VII extraterritorially in 1964, or vice versa, particularly where Congress adopted no such specific language in Title VII. If anything, the *absence* of any discussion concerning the resolution in the 1964 debates and legislative history of Title VII affirms, rather than negates, the view that Congress did *not* intend Title VII to be extraterritorially applied.

The other policy arguments of petitioner Boureslan and the NAACP Legal Defense Fund, *et al.*, center around the notion that it is necessary to press for nondiscrimination abroad in order to assure nondiscrimination at home. Br. at 16-24. In their view, the majority opinion below allows employers to transfer their domestic employees overseas so they can "launder" their discrimination. NAACP Brief at 21. In support of this idea, *amici* specifically discuss testimony presented in support of the public accommodations laws in 1963, and generally allude to the United States' foreign policy concerns in international markets. *See* NAACP Legal Defense Fund Brief at 18-22, 25-30.

Their inference is flawed for several reasons. First, the NAACP Legal Defense Fund *et al.*, assume that American employers affirmatively will engage in discrimination abroad, yet cite no support for this broad assertion. From a practical standpoint, it is very costly to send workers overseas and then pay for their return. Also, employers often must specially train workers for overseas assignments and provide them with special language training, compensation, terms and other conditions of

employment. *See generally* Note, *Yankees Out of North America: Foreign Employer Job Discrimination Against American Citizens*, 83 Mich. L. Rev. 237 (1984) (discussing whether business and cultural familiarity requirements may be necessary to insure that managers can successfully integrate the Japanese management style with American practices). The costs of such efforts are higher than those associated with domestic employment. At a minimum, the economic costs of discrimination abroad are prohibitive, and serve as effective deterrents to discourage rather than encourage employers to engage in such practices. Thus, it would make little sense for an employer to send a person of a certain race, sex, or religion overseas just to be able to discriminate once the person was outside U.S. territory.[18]

The more plausible scenario posed by petitioner Boureslan and various amici involves the United States employer who makes the decision to deny overseas opportunities to U.S. workers. Indeed, the NAACP Legal Defense Fund's brief acknowledges that "many decisions regarding positions abroad are in fact made in the United States." Br. at 18. In that situation, however, the individual's relevant work station would be this country, thus making the employer subject to Title VII. *Cf., Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d at 559 (Judge Posner).[19]

[18] The amici NAACP L.D.F., *et al.*, argue that protected individuals who know they will be discriminated against overseas will refuse such assignments, thus employers would have "to pay a premium to induce potential employees to work abroad." Br. at 20. We know of no situation where that has occurred, nor do any of the amici cite to any employer that has been willing to tolerate such costs. No employer, moreover, is likely to escape Title VII if it pursues such a policy, for, as shown below, discrimination occurring within the U.S. will be covered by Title VII.

[19] *See also, Abrams v. Baylor College of Medicine*, 805 F.2d 528 (5th Cir. 1986) (Title VII violated by exclusion of Jewish doctors from rotations to Saudi Arabia); *Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984) (employer did not violate Title VII by requiring membership in Islamic faith for pilots flying into Mecca); EEOC Decision No. 84-2, Empl. Prac. Dec. (CCH) ¶ 6840 (December 2, 1983) (Foreign company that recruits in the U.S. for employment outside the country is covered by Title VII); EEOC Decision No. 77-1, Empl. Prac. Dec. (CCH) ¶ 6557 (October 13, 1976) (Title VII applies to religious discrimination against a Canadian employee of the Canadian operations of a U.S. employer where the employee makes round trips between the U.S. and Canada).

CONCLUSION

For the foregoing reasons, EEAC respectfully urges the Court to affirm the decision of the en banc court below.

Respectfully submitted,

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